

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAN CHAMBERS, INDIVIDUALLY	§	
AND AS INDEPENDENT	§	
ADMINISTRATOR OF THE ESTATE	§	
OF JOSEPH CHAMBERS,	§	
DECEASED, KATHLEEN	§	CIVIL ACTION: H-04-0479
CHAMBERS, JASON CHAMBERS,	§	
AND JEREMY CHAMBERS,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	
	§	
THE TREVINO GROUP, INC.,	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

This personal injury case is before the court on defendant Trevino Group, Inc.’s motion for summary judgment (Dkt. 59), and plaintiffs’ cross-motion for partial summary judgment (Dkt. 63).¹ Having considered the parties’ submissions, all matters of record, and applicable legal authorities, the court recommends that defendant’s motion be granted and plaintiffs’ claims in this case be dismissed.²

¹ The district court has referred this case to this magistrate court for pre-trial management.

² Plaintiffs dismissed Werner Co. as a defendant and Trevino subsequently dismissed its cross-claim against Werner. Plaintiffs were granted leave to amend their complaint to reflect the dismissal of Werner.

Delta has a pending motion to dismiss its cross-action against Werner (Dkt. 61). The docket does not reflect that any such cross-action was filed. Therefore, this motion is denied as moot.

I. BACKGROUND FACTS

The following facts are undisputed unless otherwise noted. The Trevino Group, Inc. (Trevino) was the general contractor for the Missouri City Service Center Expansion Project, the purpose of which was to construct buildings for the repair and maintenance of ambulances and police cars. The contract between Trevino and Missouri City provides that Trevino “shall be responsible for the safety of himself, his employees and other persons during construction.”³ The contract between Trevino and Missouri City does not mention Trevino’s subcontractor, Delta Structures, Inc. (Delta), the deceased’s employer.

Trevino subcontracted with Delta to fabricate, build, and install a space frame on each of the new buildings. A space frame is a structure that supports the roof and is able to span long distances without requiring support columns. The subcontract requires Delta to abide by all safety regulations of Trevino and the premise owner, and further provides that Delta “shall be solely responsible for establishing and maintaining a safe working environment.”⁴

On June 20, 2001, a crane placed the space frame on one of the buildings. Two Delta employees, Tom Chambers and his cousin Joe Chambers, then began touch up painting and “tack welding” the frame to the perimeter columns of the building. A tack weld is a

Trevino’s third-party action against Delta for breach of a contract to defend and indemnify Trevino in the present case remains pending.

³ Invitation for Bids, Exhibit 2 to Plaintiffs’ response, ¶4.

⁴ Master Subcontract Terms and Conditions, Exhibit A to Trevino’s motion, ¶¶ 5.1, 5.2. The Master Subcontract Terms and Conditions are expressly incorporated into the specific Project Subcontract for this job. Exhibit B to Trevino’s motion.

temporary weld used to prevent the frame from shifting until it can be permanently welded in place. In order to tack weld, Joe climbed about 20 feet up a ladder. The ladder was tied to a column and a horizontal support to prevent it from moving. Trevino's project superintendent, Harvey Jones, was on-site and observed the Chambers' work on June 20. The parties dispute whether Joe used fall protection while tack-welding on June 20.

On June 21, 2001, Joe and Tom continued painting and a welder arrived to perform permanent welds. Sometime that morning, Joe resumed tack-welding while Tom continued painting from a man-lift. Jones was at the job site but was not observing the work on that day. While tack welding on June 21, Joe fell from the ladder and was fatally injured. No witnesses saw Joe fall.

Plaintiffs have sued Trevino for negligence. Trevino moves for summary judgment on the claims brought by Joe's brothers on the ground that siblings have no cause of action for wrongful death under Texas law. Trevino moves for summary judgment on all plaintiffs' claims on the ground that a general contractor owes no duty of care to an independent contractor. Plaintiffs contend that Trevino retained both contractual and actual control over job site safety, and cross-moves for summary judgment on the issue of contractual control.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of

material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is “genuine” if the evidence could lead a reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001). “An issue is material if its resolution could affect the outcome of the action.” *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002).

If the movant meets this burden, “the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.” *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)); *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). If the evidence presented to rebut the summary judgment is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the nonmoving party. *Id.* at 255; *Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 817 (5th Cir. 2002).

III. ANALYSIS

A. Cause of Action by Siblings

Texas law applies to the liability issues in this diversity case.⁵ Texas law provides an action to recover damages for wrongful death “for the exclusive benefit of the surviving spouse, children, and parents of the deceased.” TEX. CIV. PRAC. & REM. CODE § 71004(a).

⁵ Plaintiffs’ concede this point. Plaintiffs’ response (Dkt. 62), at 6.

Under Texas law, siblings do not have standing to bring a wrongful death action in their individual capacities. *Aguillard v. McGowen*, 207 F.3d 226, 231 (5th Cir. 2000) (applying Texas law).

Nonetheless, plaintiffs argue that the brothers' claims should not be dismissed because they are residents of Illinois, and Illinois law applies to the issue of damages. This argument is without merit, and is unsupported by any authority. *Transco Leasing Corp. v. United States*, 896 F.2d 1435, 1450 (5th Cir. 1990), cited by plaintiffs, is not on point. *Transco* is a Federal Tort Claims Act case. Under that Act, the law of the state where the act or omission occurs applies, including the choice of law rules. *Id.* at 1450. Applying Texas choice of law rules, the court determined that Louisiana had the most significant relationship to the damages issue because "Texas . . . has no interest in the amount of wrongful death damages awarded to Louisiana residents." *Id.* at 1451. However, that court applied Texas law to determine that the plaintiffs were entitled to bring the action. *See id.* at 1443 (applying the Texas Wrongful Death Act in determining that plaintiffs had given statutorily required notice of their claim).

As plaintiffs concede, albeit reluctantly,⁶ Texas clearly has the most significant interest to the liability issues in this case, *i.e.*, under what conditions a general contractor is liable for injuries to an independent contractor's employee caused by unsafe work practices in this state. It is axiomatic that a plaintiff must have a cause of action before recovering any

⁶ Plaintiffs' response, at 6.

damages. Jason and Jeremy Chambers cannot sustain an action against Trevino for the wrongful death of Joe Chambers under Texas law.

B. Duty of Care of General Contractor to Independent Contractor

A general contractor owes the same duty as a premises owner to an independent contractor's employee. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 605-06 (Tex. 2002) (citing *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 n.1 (Tex. 1999)). There are two types of premises defects: those existing on the premises when the independent contractor entered, and those the independent contractor created by its work activity. *Id.* (citing *Coastal Marine Serv. of Tex. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999)). A general contractor generally owes no duty to an independent contractor's employees for the second type of defect. *Id.* An exception to this general rule exists when the general contractor retains control over the independent contractor's work. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985) (adopting the RESTATEMENT (SECOND) OF TORTS § 414 cmt. c. (1965)).

A plaintiff can prove that the general contractor retained a right to control the work in two ways: (1) by an express contractual provision; or (2) actual exercise of control. *Dow Chem.*, 89 S.W.3d at 606. The right to control, however, requires more than a general right to start or stop work, to inspect progress, or to receive reports. *Id.* In order to be liable, the general contractor must retain some degree of control over the means, methods, or details over the independent contractor's work. *Id.*; *Elliott-Williams Co., Inc. v. Diaz*, 9 S.W.3d 801, 804 (Tex. 1999). In other words, "[t]here must be such a retention of a right of supervision

that the [sub]contractor is not entirely free to do the work in his own way.” *Koch*, 11 S.W.3d at 155. Determining whether a contract gives a right of control is generally a question of law for the court, while determining whether the general contractor exercised actual control is generally a question of fact. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001).

There is no dispute in this case that Joe Chambers’s employer, Delta, acted as an independent contractor on the Missouri City project. There is also no dispute that Joe’s death was not caused by a premises defect that existed on the premises before he entered. Thus, the issue is whether Trevino retained control over Delta’s work to the degree necessary to give rise to a duty of care.

Contractual Retention of Control– Neither the Master Subcontract nor the Project Subcontract contain any provisions that dictate the means, method, or details of how Delta was to perform its work.⁷ In fact, the subcontract expressly and squarely places the responsibility on Delta to perform its work safely.⁸

Plaintiffs argue that Trevino retained contractual control through its contract with the premises owner, Missouri City. That contract states: “[Trevino] shall be responsible for the

⁷ See Master Subcontract, Exhibit A to Trevino’s motion; Project Subcontract, Exhibit B to Trevino’s motion.

⁸ Master Subcontract, Exhibit A to Trevino’s motion, at ¶¶ 5.1, 5.2.

safety of himself, his employees and other persons during construction.”⁹ Under Texas law, this provision is not sufficient to override the general rule that a general contractor does not owe a duty of care to his independent contractors.¹⁰

In contrast, in *Lawson-Avila Const., Inc. v. Stoutamire*, 791 S.W.2d 584, 589 (Tex. App.–San Antonio 1990, writ denied), cited by plaintiffs,¹¹ the general contractor’s contract with the project owner provided that the general contractor (appellant): “shall supervise and direct the Work using his best skill and attention. [Appellant] shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.” *Id.* The contract at issue in that case contained numerous other clauses making the general contractor responsible for supervising all work, including that of subcontractors, at the site. *See id.* Moreover, it is unclear whether the

⁹ Invitation for Bids, Exhibit 2 to Plaintiffs’ response, ¶4. Plaintiffs filed a third response (Dkt. 64) attaching as an exhibit the entire contract, which is approximately 150 pages long. Plaintiffs cite no contractual provisions in their responses other than that referenced above. If there are other provisions that plaintiffs’ contend constitute a contractual retention of control by Trevino, they should have cited them; the court is not obligated to search the record for evidentiary support for plaintiffs’ claims. *See Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 916 (5th Cir.1992). Nonetheless, the court has reviewed the entire contract and found no provisions making Trevino responsible for oversight of the means, methods, or details of its subcontractors’ work.

¹⁰ The cases presented to the court by plaintiffs’ counsel at the hearing are inapposite because they are cases in which the general contractor or project owner expressly retained responsibility for safety at the job site in the subcontract to which the independent contractor itself was a party. *See Pollard v. Missouri Pac. R.R. Co.*, 759 S.W.2d 670 Tex. 1988); *Tovar v. Amarillo Oil Co.*, 692 S.W.2d 469 (Tex. 1985); *Ogle v. Shell Oil Co.*, 913 F. Supp. 490 (E. D. Tex. 1995).

¹¹ *See* Plaintiffs’ third response (Dkt. 75).

court's holding was based on a contractual right of control, or on an actual exercise of control. "In addition to the contract," the court relied upon testimony regarding the general contractor's actual supervision of the work. *Id.*

In *Elliott-Williams*, also cited upon by plaintiffs, the Supreme Court interpreted a contract that provided that the general contractor was the sole contractor and was "fully responsible for the actions of all employees and contracted representatives" and required the general contractor to indemnify the project owner for any injury to person or property proximately caused by the general contractor. 9 S.W.3d at 802-03. Based on that contract, the court of appeals determined that the general contractor retained control over an independent contractor hired by one of its subcontractors. *Id.* at 803. The Supreme Court disagreed, holding that while the contract at issue required the general contractor to take financial responsibility for any claims against the project owner, the "contract does not impose liability on [the general contractor] for Diaz's injury because it does not require [the general contractor] to control the means, methods, or details of [the independent contractor's] work."¹² *Id.* at 805. The same reasoning applies in this case. Trevino's contract with Missouri City does not create a duty of care owed by Trevino to Delta's employees.

¹² In *Lee Lewis*, the Supreme Court found the evidence sufficient to support the jury's finding that Lee Lewis retained actual control over the job site, and therefore did not address the contractual right to control issue. 70 S.W.3d at 784. Although concurring opinions express approval of the contractual right to control finding, *id.* at 788, 800, the contract at issue in that case had much more in common with that in *Lawson-Avila* than the contract at issue here. See *Lee Lewis Const., Inc. v. Harrison*, 64 S.W.3d 1, 8-9 (Tex. App.—Amarillo 1999), *affirmed on other grounds* 70 S.W.3d 778 (Tex. 2001).

Exercise of Actual Control– Harvey Jones, the project superintendent for Trevino, observed work by Tom and Joe Chambers on June 20. Jones testified that he told Tom and Joe they needed to use fall protection at the height at which they were welding.¹³ He states he gave them a harness, which he saw Joe put on before climbing the ladder and welding. According to Jones, the harness was tied off to the metal frame structure that Joe was welding to the columns, and Tom held the ladder while Joe was on it.¹⁴ After the work on June 20, Tom gave the harness back to Jones and he put it back in his truck.¹⁵

Tom testified that what Jones witnessed on the 20th was the same thing he would have seen had he been watching on the 21st.¹⁶ However, Tom's version of events on June 20 differs from Jones's account. Tom testified that Joe did not wear a safety harness on that day, that Jones never gave them a harness, and that Jones did not instruct him to hold the ladder. Tom says that if Jones had given such instructions, he and Joe would have followed them.¹⁷

Jones was at the job site on June 21, but was not observing Tom and Joe work. Jones states that when he ran to the site immediately after Joe fell, he observed that the ladder was

¹³ Oral Videotaped Deposition of Harvey Jones, November 8, 2004, Exhibit 1 to Plaintiffs' response ("Jones Depo."), at 29-31.

¹⁴ *Id.* at 29-31.

¹⁵ *Id.* at 32.

¹⁶ Videotaped Orad Deposition of Thomas R. J. Chambers, May 12, 2005, Exhibit 3 to Plaintiffs' response ("Chambers Depo."), at 49.

¹⁷ *Id.* at 55-57, 76-77, 123.

positioned against the corner of a column, creating an unstable situation. He testified that if he had seen the ladder in that position, he would have stopped the work and made them reposition the ladder.¹⁸ According to an incident report prepared by Missouri City Fire & Rescue Services, Jones told the responding officer at the scene of the accident that as far as he knew the sub-contractors were working safely, but there were no daily or weekly safety meetings conducted and workers were not required to wear hard hats or harnesses.¹⁹

The leading Texas cases on general contractor liability are *Lee Lewis Constr. v. Harrison*, 70 S.W.3d 778 (Tex. 2000), and *Dow Chemical Co. v. Bright*, 89 S.W.3d 602 (Tex. 2002). In *Lee Lewis*, the employee of a subcontractor fell from the tenth floor of a hospital tower and died. His wife, children and parents sued the general contractor for negligence. *Id.* at 782. In upholding the jury verdict for the plaintiffs, the court found that there was more than a scintilla of evidence that the general contractor retained a right to control fall-protection systems on the job site. *Id.* at 784. In that case, there was testimony that the general contractor, Lewis, “personally witnessed and approved of the specific fall-protections systems;” and that Lewis “definitely did approve” the defective system. *Id.*

In *Dow Chemical*, a carpenter working for an independent contractor hired by Dow Chemical Company to perform construction work was injured when an overhead pipe fell

¹⁸ Jones Depo., at 42.

¹⁹ Missouri City Fire & Rescue Services Incident Report prepared 7/17/01, Exhibit 4 to Plaintiffs’ response, at 7.

on him. 89 S.W.3d at 605. As in this case,²⁰ the evidence in *Dow* established that the general contractor did not instruct the independent contractor in how to do his work. *Id.* The plaintiff argued that Dow retained actual control because it had the right to stop work if it observed a safety hazard and had safety representatives at the work site. *Id.* at 607-08. The court noted that “[h]ad the Dow safety representative actually approved how the pipe in question was secured or instructed [plaintiff] to perform his work knowing of the dangerous condition, we could have a fact scenario mirroring *Lee Lewis*. However, we have never concluded that a general contractor actually exercised control of a premises where, as here, there was no prior knowledge of a dangerous condition and no specific approval of any dangerous act.” *Id.* at 609. The *Dow* court further held that Dow’s failure to implement a safety rule regarding how pipes should be secured is not actual control. *Id.* Plaintiffs argue that *Lee Lewis* supports liability here, where there is evidence that Jones knew of an unsafe condition at the work site and did not correct it. This argument requires an extension of *Lee Lewis* that is contrary to the Texas Supreme Court’s decision in *Dow Chemical*.²¹ In *Dow*

²⁰ Tom Chambers confirmed in his deposition that Trevino did not instruct him or Joe how to perform the details of their work. Chambers Depo., at 117.

²¹ Based on the fact that the defendant in *Lee Lewis* was the project general contractor, and the defendant in *Dow Chemical* was the project owner, plaintiffs surmise that the Supreme Court intends to hold a general contractor to a higher duty of care than a premises owner. *See* Plaintiff’s fourth response (Dkt. 76). While interesting, nothing in the cases themselves supports this contention. In addition, any holding based on such a distinction would be contrary to the well-established rule that a general contractor stands in the same shoes as the premises owner vis-a-vis an independent contractor. *See, e.g., Koch*, 988 S.W. 2d at 155 n.1; *see also Elliott-Williams*, 9 S.W.3d at 804-05 (finding general contractor not liable).

Chemical, the court distinguished *Lee Lewis*, where there was some evidence of approval of a dangerous condition, and cases where the evidence is only that the general contractor had a safety representative on site that should have observed and stopped the independent contractor's work. 89 S.W.3d at 609. The evidence supports a finding that Trevino had a right to stop work and to enforce safety requirements on the job site. It also creates a fact question as to whether Jones observed unsafe conditions and failed to object.²² However, there is no evidence that Trevino, through Jones, observed *and expressly approved* unsafe work conditions. Accepting all of plaintiffs' evidence as true,²³ it establishes at most that Trevino did not exercise control over safety or any other aspect of Delta's work.

IV. CONCLUSION AND RECOMMENDATION

Plaintiffs have not presented evidence that, if proven, would establish that Trevino retained control over Delta's work, either contractually or through the actual exercise or control. Thus, plaintiffs cannot prove that Trevino owed a duty of care to Joe Chambers. For the reasons explained above, this court recommends that Trevino's motion (Dkt. 59) be

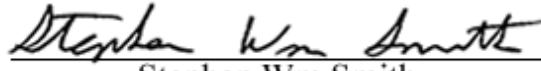
²² Plaintiffs' evidence on this point is not particularly strong. While it is undisputed that Jones observed the work on June 20, the ladder was moved to a different column to continue work on June 21. Thus, there is no evidence that conditions were exactly the same on June 21 as June 20. Moreover, even if Jones observed Joe up on the ladder without fall protection on June 20, there is no evidence that Jones knew that Joe Chambers would continue working on the ladder on June 21. In fact, there was another welder on site that day, and Joe started the day painting from the cherry picker with Tom.

²³ As previously stated, Tom Chambers testified that Jones never told him or Joe to wear fall protection, never told him to hold the ladder while Joe was on it, never gave them any safety instructions of any sort. This is consistent with the contractual provision assigning the subcontractor responsibility for ensuring the safety of its employees' work.

granted in its entirety. Accordingly, the court recommends that plaintiffs' cross-motion (Dkt. 63) for summary judgment on the issue of Trevino's contractual retention of control be denied.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on October 18, 2005.



Stephen Wm Smith
United States Magistrate Judge